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91-137

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. _____

ROBERT AND ALICE BEARD,

Petitioners,

v.

SOUTH CAROLINA COASTAL COUNCIL, SIERRA CLUB, CHARLESTON NATURAL HISTORY SOCIETY AND SOUTH CAROLINA WILDLIFE FEDERATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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QUESTION PRESENTED

I. Whether the denial of Petitioners' Permit for a bulkhead on their beachfront property line violates the Fifth Amendment of the United States Constitution.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. _____

Robert Beard and Alice Beard[1], Petitioners,

vs.

South Carolina Coastal Council, Sierra Club, Charleston Natural History Society, and South Carolina Wildlife Federation, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

Robert and Alice Beard and The South Carolina Tourism Council petition for a writ of certiorari to review the judgment of the South Carolina Supreme Court in this case.

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[1]The S.C. Tourism Council is also a petitioner.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court (Appendix A1 and, by the South Carolina Supreme Court's incorporation by reference in its opinion, A2, printed in the separate volumes of appendices) is reported at ___ S.C. ___, 403 S.E.2d 620 (1991). The final order of the South Carolina Supreme Court denying rehearing is not reported (See Appendix D.) The opinions of the circuit court and of the South Carolina Coastal Council are not reported. (See Appendices B and C.)

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.A. §1257(a).

The judgment of the Court below was entered on April 17, 1991.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The South Carolina Coastal Zone Management Act [Section 48-39-10 et seq. of the 1976 S.C. Code Annotated] is set forth in Appendix E in the separate volumes of Appendices.

STATEMENT

The petitioners in this case are Robert and Alice Beard, who own four contiguous oceanfront lots in the City of North Myrtle Beach, South Carolina. Each lot is 50' by 125' and extends between the publicly owned dry sand beach adjacent to the Atlantic Ocean and Ocean Boulevard. The lots are contiguous to one another and each contains a small beach house which is available to the public for rent.

Three of the four lots have wooden bulkheads fronting the Atlantic Ocean. The bulkheads extended to a point approximately 18 1/2' and 25' landward of the oceanfront property line. The fourth lot has no bulkhead. The area on both sides of the existing bulkheads is sand with the only difference that some vegetation appears landward of the bulkheads. The ground level on both sides

of the existing bulkhead is generally the same.

On February 4, 1987 the Beards applied to the South Carolina Coastal Council for a permit to construct a new wooden bulkhead at the approximate location of their seaward property line on all four lots. The Coastal Council staff denied the permit on March 30, 1987. The Beards appealed this denial through the administrative appeals process, including a ground that the denial was an unconstitutional taking of their property under the Fifth Amendment of the U.S. Constitution. On September 2, 1988 the South Carolina Coastal Council issued its final administrative order upholding the staff's denial of the permit.

An appeal was commenced in circuit court in Horry County, South Carolina. The Beards asked the circuit court to

either issue the permit pursuant to state law or to hold that the denial of the permit constituted an unconstitutional taking of that portion of the Beards' property lying between the existing bulkheads and the proposed bulkhead, or their seaward property line in violation of the Fifth Amendment of the United States Constitution. On September 8, 1989 the circuit court ruled that the Coastal Council had the statutory authority to deny the Beards' permit, but that such denial was an unconstitutional taking without just compensation of the affected portion of the Beards' property.

The circuit court ruling that an unconstitutional taking had occurred was appealed to the South Carolina Supreme Court by the South Carolina Coastal Council. The South Carolina Supreme Court heard oral arguments on June 1, 1990 and

issued its order on March 11, 1991 reversing the circuit court and finding that no unconstitutional taking had occurred. The petition for rehearing was denied by the South Carolina Supreme Court on April 17, 1991.

The record reflects without contention that the beach area involved is accretional and not erosional. There is also no contest concerning the application of the 1977 Coastal Management Act, Section 48-39-10 et seq., 1976 South Carolina Code of Laws, as amended, and that neither the 1988 nor 1990 amendments to this Act related to beachfront management apply to this case.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the effective granting of an easement for public use through the restriction of private property rights where there is no nexus between the denial and a legitimate state interest. The approximately 5,000 sq. ft. of real estate owned by the Beards which would be enclosed by the requested bulkhead may not be improved by the Beards or their renters in any way which would exclude the public. Only by continuous, active and vigilant physical presence could the Beards or their renters hope to exclude the beach-going public from this property. The record reflects that grandiose effort on the part of the South Carolina Coastal Council to portray this private property as being useful only as a public beach area and as having had that use for many

years. The South Carolina Supreme Court, because it fabricated a finding in the State Coastal Management Act that such bulkhead construction was a serious public harm, did not even reach the question of what use, if any, would be allowed on this 5,000 sq. ft. of the Beard's property. The South Carolina Supreme Court merely found that the property could be posted and trespassers ejected as a satisfactory means of maintaining this part of the private property to the exclusion of others. This simplistic approach effectively extinguishes the right to exclude others in the factual setting of this case. The property line here could be drawn in the shifting sand in order to give notice to the public on the beach, particularly the public on the beach area beyond this oceanfront property line all the way to the high water mark, that there

is private property between the existing bulkheads and the remainder of the dry sand area. But it is impractical to draw lines in the shifting sand and unreasonable to require a property owner to exert such vigilance to attain what the Constitution purportedly protects. Where the denial of the right to effectively exclude the public from use of one's property is not based upon or sufficiently related to a legitimate state interest, this Court has found a violation of the Fifth Amendment of the United States Constitution. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). Where the denial results in a physical occupation by the public, an analysis of regulatory takings law is not required, for "'the character of the government action' not only is an important factor in resolving whether the action works a

taking but also is determinative." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). The denial is government action that can fairly be characterized as an invitation to the public on the adjacent beach to cross the invisible property line and to use the indistinguishable private area as a public area. Without compensation, and particularly without a reasonable relationship between the government action and a legitimate state interest, a taking under the Fifth Amendment has occurred. The South Carolina Supreme Court failed to apply Nollan, 483 U.S. 825 (1987), and mistakenly found that no taking had occurred in this case.

There is no relation between the denial of the permit and any legitimate state interest under the Coastal Management Act. Contrary to the South

Carolina Supreme Court's statements, the proposed bulkhead cannot be characterized as creating any harm. The beach is accreting in this area, which fact nullifies any argument that the bulkhead could cause increased scouring or otherwise exacerbate a continuing erosion problem. The South Carolina Supreme Court erroneously concluded that a mere failure to challenge the legislative findings and policies of the 1977 Coastal Management Act, a review of which fails to disclose any statements alluding to bulkheads or serious public harm, is a concession that the protection of the coastal environment is a legitimate state interest and that regulation of the property is necessary to protect against serious public harm. Petitioner does not contest that protection of the coastal environment is a legitimate state interest nor that

prevention of serious public harm may be accomplished by regulation under certain circumstances. In this case, however, these statements are irrelevant because there is no serious public harm caused by the proposed bulkhead in fact nor any claim to that effect in the law. While this Motion may be applicable to the Lucas case (Lucas v. S.C. Coastal Council, S.C. S.Ct. Slip Op. No. 23342, February 11, 1991), cited in the Beard opinion, it is not applicable here.

Petitioners acknowledge that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." Keystone Coal Association v. DeBenedictis, 480 U.S. 470, 479-80, (quoting Mugler v. Kansas, 123 U.S. 623, at 665 (1887)). In this case, where no injury is exposed in the record except for

the very issue on appeal, that being the threat of ending the public's use of this private property, Keystone's analysis need not be applied. The diminution of value question need not be reached because no legitimate state interest supports the denial of the bulkhead and the physical invasion of the public on this particular private property has effectively removed it from Petitioners' meaningful possession under our constitution. Nollan, 483 U.S. 825 (1987); Loretto, 458 U.S. 419 (1982); Kaiser-Aetna, 444 U.S. 164 (1979).

The fact that this case involves the physical invasion and occupation of private property by the public because of state action as well as a lack of sufficient nexus between the state action creating the physical invasion and a legitimate state interest provides this Court with a unique opportunity to further

clarify the private property rights protected by the Fifth Amendment of the United States Constitution and the threshold upon which state action must stop to avoid becoming unconstitutional. In Kaiser-Aetna v. United States, 444 U.S. 164 (1979); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); and Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), this Court has expressed principles that are at odds with the holding of the South Carolina Supreme Court in this case. This Court has suggested that a permanent physical occupation would never be exempt from the Takings Clause, see Loretto, 458 U.S. at 432, and that "the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property." Nollan, 483 U.S. at 831 (citing Loretto, 458 U.s. at

433; Kaiser-Aetna v. United States, 444 U.S. 164, 176 (1979). This Court's holding that a taking is found to the extent of the occupation, "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner", Nollan, 483U.S. at 831-32 at 686, (citing Loretto, 458 U.S. 419, 434-35 (1982) (emphasis added)), must be applied in this case along with the holding that denying an activity would be constitutional if it accomplished a legitimate state interest. Nollan, 483 U.S. at 689. Here, where there is no nexus between the legitimate state interest of protecting the coastal environment and the denial of the permit, and where the denial results in a physical invasion by the public because of the impossibility of excluding others, the use by the public of this private land is an

ill-gotten benefit for which the owners must be compensated. "A State, by ipse dixit, may not transform private property into public property without compensation." Loretto, 458 U.S. at 439, (citing Webbs Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980)).

In summary, even if this Court disagreed that the prohibition of constructing the bulkhead on the property line creates a physical invasion by the public of petitioner's property, this Court should find that a taking has occurred because there is no rational relationship between the prohibition of the construction of the bulkhead at this location and the acknowledged legitimate state interest of protecting the coastal environment. Because the bulkhead would be constructed on a beach which is accreting, and not eroding, the only

negative impact found in the record for the proposed bulkhead would be to reduce the area used by the public adjacent to the Atlantic Ocean for recreation. The South Carolina Supreme Court found that such public use of this private property was not a taking. This decision is at odds with the decisions of this Court which require something more than the fabrication of "serious public harm" in order to damage private property rights.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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